

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
the Bell Operating Companies' Tariff)
for the 800 Service Management System,)
Tariff F.C.C. No. 1)

Transmittal No. 1 /

requiring the GTOCs to implement the Bureau-ordered rates and allow the GTOCs' filed rate to go into effect subject to an accounting order. 47 U.S.C. § 204(a)(1).

INTRODUCTION

When an agency imposes a rate below that filed by the carrier, the carrier is typically permitted to place its rates in effect pending review. Indeed, in an analytically indistinguishable situation, the Supreme Court granted a stay in the *Trans Alaska Pipeline Rate Cases (TAPS)*, 436 U.S. 631 (1978). That case, as here, involved a situation where the carriers filed rates covering a new service. On initial review, the ICC (as the Bureau did here) concluded the carrier-initiated rates probably exceeded the zone of reasonableness. Therefore, the ICC (again, as the Bureau did) suspended the carrier-filed rates for the maximum statutory period. The ICC (like the Bureau) was anxious to make the new service available. The ICC, however, did not order interim rates. Rather, the ICC told the pipelines that if they filed interim tariffs not to exceed a certain rate level, those rates would not be suspended. Thus, unlike the Bureau, the ICC gave the pipelines the option of filing lower interim rates or waiting out the suspension period. That option, unlike the Bureau's order, avoided the problem of prescribing interim rates without holding a hearing.

Nevertheless, the pipelines sought review and a stay of the ICC's suspension order. The Fifth Circuit denied the stay

request pending review, but the Supreme Court granted the stay - the pipelines were permitted to charge their initially filed tariff rates pending review. *Mobil Alaska Pipeline Co. v. United States*, 434 U.S. 913 (1977). After the Fifth Circuit ruled, the Supreme Court issued a supplemental stay pending its review. See *TAPS*, 436 U.S. at 638.

The rationale for granting a stay in such a situation is compelling: If the agency ultimately determines that the carrier-initiated new rates are just and reasonable, the carrier will be unable to recoup the lost revenues resulting from the Commission-ordered lower rates. Moreover, the carrier's customers can be fully protected by imposing an accounting order which will assure refunds if the filed rates are ultimately found excessive.

BACKGROUND

This Commission recently directed all local exchange carriers, including the GTOCs, to file access tariffs to implement "800 data base service," thus allowing portability of "800" numbers for the first time. The Commission prescribed a rate structure and filing dates for 800 data base access tariffs and tariffs for a Service Management System (SMS/800) to support the provision of 800 services.¹

1. Provision of Access for 800 Service, Notice of Proposed Rule Making, 102 F.C.C.2d 1387 (1986); Supplemental Notice of Proposed Rule Making, 3 FCC Rcd 721 (1988); Report and Order, 4 FCC Rcd 2824 (1989); Memorandum Opinion and Order on (continued...)

As required, the GTOCs filed their 800 data base access tariffs on March 1, 1993 to become effective May 1, 1993. The GTOCs filed cost and other support justifying the level of the access charges set out in the tariffs.

Ignoring that evidence, the Bureau "performed a statistical analysis" and, based solely on that analysis, concluded that any rates that "exceeded the industry mean rate plus one standard deviation" were presumptively unreasonable. *800 Data Base Tariff Order* at 7-8 ¶ 19. The GTOCs rates exceed that threshold.

Rather than suspend the GTOCs tariffs for one day and allow them to go into effect subject to investigation and an accounting order -- the procedure the Communications Act contemplates, see *Illinois Bell Tel. Co. v. FCC*, 966 F.2d 1478, 1481-82 (D.C. Cir. 1992) -- the Commission ordered (under the guise of a "partial suspension") the GTOCs to roll back their rates to the presumed reasonable level pending investigation and put those rates under an accounting order. *800 Data Base Tariff Order* at 8 ¶ 19. The Bureau then gave the GTOCs one day to file the Bureau-ordered rates (*800 Data Base Tariff Order* at 10 ¶ 32) and directed that those rates be filed on one day's notice. *800 Data Base Tariff Order* at 9 ¶ 24.

1.(...continued)

Reconsideration and Second Supplemental Notice of Proposed Rule Making, 6 FCC Rcd 5421 (1991); Order, 7 FCC Rcd 8616 (1992); Second Report and Order, 8 FCC Rcd 907 (1993) (*Rate Structure Order*); Memorandum Opinion and Order on Further Reconsideration 8 FCC Rcd 1038 (1993); Order, 8 FCC Rcd 1423 (1993); Order, DA 93-294 (March 11, 1993).

**THE REASONS THE COMMISSION
SHOULD STAY THE BUREAU'S SUSPENSION
OF THE GTOCS' 800 DATA BASE TARIFF**

The Commission should stay that portion of its 800 Data
Base Order which suspends the GTOCs' tariff filing and,
thereafter, directs the GTOCs to file and implement lower rates

irreparable injury is certain if the lower rates have been charged and, thereafter, the Commission finds the GTOC-filed rates are reasonable or the Court set asides the *800 Data Base Order's* imposition of lower rates. *Second*, the "likelihood of success" standard is not a sensible standard at the agency

**1. The Bureau's Rate Reduction
Order Violated Section 205
of the Communications Act.**

When carriers file tariffs, the FCC has two options. Section 204(a)(1) allows the FCC to suspend the tariff's effective date for up to five months while the FCC investigates the proposed rates. If the FCC has not finished its investigation at the end of the suspension period, the rates go into effect by operation of law. At that time, the Commission may impose an accounting order to cover possible refunds. The FCC's other option is to allow the tariff to take effect on schedule without suspension.

Here the Bureau went beyond those two options and ordered the GTOCs to file a lower rate. The Bureau may not do that under the guise of a suspension order.

The Communications Act is very explicit that the Commission may order an adjustment to a carrier-initiated rate only after giving the carrier a "fully opportunity for a hearing" and a finding based on the evidence that the carrier-initiated rate is unreasonable. 47 U.S.C. § 205. Thus, regardless of the Commission's authority to partially suspend a rate filing, Section 204(a) does not give the Commission authority to order a carrier to implement a lower rate without the requisite hearing and findings based on record evidence:

To permit the Commission to achieve the same result as it would pursuant to a Section 205 rate prescription, by circumventing the statutory hearing and finding requirements on the basis of its claimed broad and inherent regulatory power,

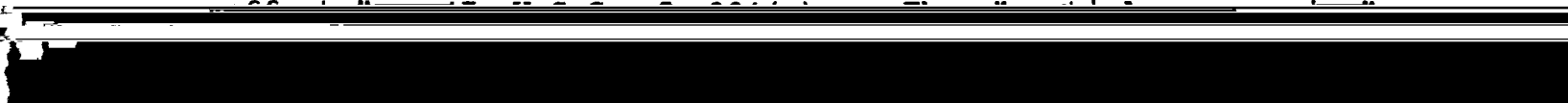
would defeat the purpose of Section 205 and vitiate the specific statutory scheme.⁴

Here, the pertinent record evidence was the GTOCs' cost study submitted with its tariff filing. This material showed the GTOCs' costs and demand characteristics. The Bureau's Order does not directly dispute the GTOCs' support other than finding that the GTOCs' rates are higher than those of the seven Regional Bell Operating Companies ("RBOCs"). The Bureau's


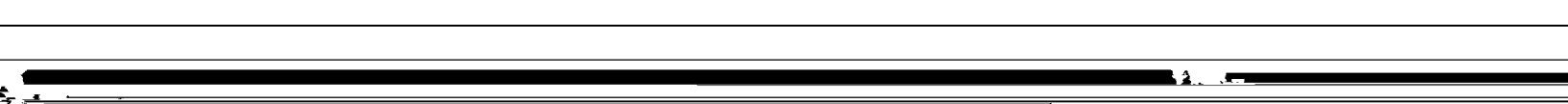
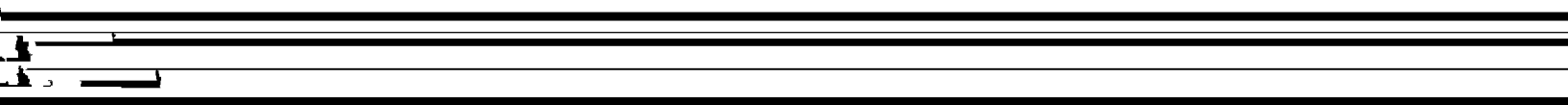
lacking any evidentiary support, it was directly contrary to the relevant record evidence.

**2. The Bureau Exceeded Its Authority
Under Section 204(a) "Partial
Suspension" Provision.**




Section 204(a) provides that the Commission may "suspend the operation of such charge, classification, regulation, or practice, in whole or in part but not for a longer period than five months beyond the time when it would otherwise go into



17



YES



explained that the basic purpose was to mitigate the effects of regulatory lag on carrier-initiated tariff changes to and rate increases for existing services:

Section 204 does not now specifically authorize the Commission to separate questionable items from legitimate aspects of a tariff filing and thus does not permit the Commission to suspend the former and implement the latter. In addition, the Commission does not have the authority to implement a temporary tariff change. Because legitimate changes may await completion of the hearing on questionable elements of a tariff, an unnecessary regulatory lag may be created.

The Administrative Conference of the United States recommended that regulatory agencies seek statutory authority to allow temporary or partial rate increases in order to solve this problem. The amendatory language proposed by the Commission is designed to implement this recommendation. It authorizes the Commission to make a preliminary judgment as to whether a tariff filing should become effective or be suspended in whole or in part pending hearing.⁸

Congress adopted this rationale. The House Report endorsed the legislation for precisely the reasons advanced by the Commission:

As discussed below, HR 13961 would authorize the Commission to conduct a preliminary written proceeding on a tariff filing and based thereon to grant partial or temporary tariff changes pending full hearing on the lawfulness of the filing.

. . . .

In the Committee's judgment, the new authority to approve temporary or partial tariff changes will provide the Commission with the flexibility needed to mitigate the unnecessary effects of

8. House Report No. 94-1315 (June 30, 1976), reprinted in 1976 US Code Cong. & Ad. News 1926, 1933 (emphasis added).

regulatory delay which presently attend the hearing and suspension process.⁹

Nowhere in this legislative history did the Commission request, nor did the Congress intend to give, authority for the Commission to prescribe interim rates for new services at a level less than the rate filed by the carrier. While the House Report discusses the need to allow portions of rate changes, there is no discussion on the need for the Commission to have the power to set entirely new rates for new services on an interim basis. Instead, as discussed in the previous section, the Commission's only power to set a new rate is under Section 205, and the *800 Data Base Order* does not purport to use that section.

B. The GTOCs Will Suffer Irreparable Injury If a Stay Is Not Granted

The potential injury to the GTOCs is great and irreparable if they are forced to charge the Bureau-ordered rates pending review of the filed rates. The GTOCs will be forced to provide 800 date base service at less than the GTOCs' cost of providing that service -- that is what the GTOCs' uncontradicted cost evidence shows. See p. 8, above. Moreover, the difference between GTOCs' cost-justified rates and the Bureau-ordered lower rates is not trivial. Over the five month suspension period, the GTOCs will be deprived of approximately \$3.3 million in revenues.

9. House Report No. 94-1315 at 1927, 1929-30 (emphasis added).

Those losses are irreparable. The courts have ruled that carriers bear the losses occasioned by the suspension of rate filings. It is just such a possibility, particularly where customers are fully protected, that warrants granting a stay of an order reducing rates pending review.

C. A Stay Will Not Harm Others

If a stay is granted and the Bureau-ordered rates are upheld, the required refunds will be made with interest. The availability of refunds with interest eliminates the potential for harm to others if a stay is granted.¹⁰ Thus, potential recipients can hardly claim that a stay would harm them.

D. No Public Interest Reasons Exist For Requiring The GTOCs To Charge Lower Rates Pending The Ruling On The Lawfulness Of the Bureau Ordered Rate.

There is no reason why the Commission should force the GTOCs to charge the Bureau-ordered rates pending a determination of the lawfulness of the Bureau's order. The potential beneficiaries of the lower rates -- principally, AT&T, MCI and Sprint -- are fully protected. If the Bureau-ordered rates are affirmed, the GTOCs will have every incentive to make refunds just as quickly as possible to avoid further accumulation of their interest liability.

10. See, e.g., *Papago Tribal Util. Auth. v. FERC*, 628 F.2d 235, 240-41 (D.C. Cir. 1980).

CONCLUSION

For the foregoing reasons, the Commission should stay the portions of its *800 Data Base Tariff Order* requiring the GTOCs to implement the Bureau-ordered rates and allow the GTOCs' filed rate to go into effect subject to an accounting order.

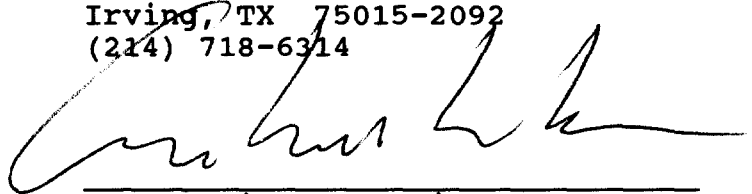
Respectfully submitted,

GTE Service Corporation on behalf
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April 29, 1993

CERTIFICATE OF SERVICE

I, Jennifer McCain, hereby certify that a copy of the foregoing "Emergency Motion for a Stay" has been mailed by first class United States mail, postage prepaid, on the 29th day of April, 1993 to the parties of record in this proceeding.


Jennifer McCain